

Daniel Riesel
Direct Dial: (646) 378-7224
driesel@sprlaw.com

August 26, 2016

Mr. Eric Schaaf
Regional Counsel
United States Environmental Protection Agency
Region II
290 Broadway
New York, New York 10007

Mr. Walter Mugdan
Director, Emergency and Remedial Response Division
United States Environmental Protection Agency
Region II
290 Broadway
New York, New York 10007

Re: Lower Passaic River Settlement Negotiations

Dear Eric and Walter:

This letter, on behalf of our client Coats & Clark, Inc. ("Coats & Clark"), arises from EPA's March 31, 2016 notice setting forth an anticipated framework for negotiations with respect to the remedial action (the "FFS Remedy") for the lower 8.3 miles (the "FFS Study Area") of the Lower Passaic River ("LPR"). In light of our prior request for the initiation of de minimis settlement negotiations, we were heartened by EPA's acknowledgment that "some of the parties that have been identified as PRPs may be eligible for a cash out settlement with EPA."¹ We understand that EPA is currently considering the scope and structure of potential cash out criteria. While we fully realize that you and your colleagues are well equipped to develop such criteria, we would like to take this opportunity to share our views on a potential settlement framework that may be of use in your deliberations. We believe that this approach, informed by EPA's Record of Decision ("ROD"), as well as applicable regulations and guidance, will facilitate settlement and advance the remediation of the LPR.

1. EPA should use all of its Section 122 authority to craft an equitable cash out settlement

EPA's broad statutory authority to enter cash out settlements under CERCLA § 122 is particularly appropriate at sites, such as the LPR, with large numbers of relatively minor PRPs. Consistent with the approach set forth in its March 31 letter, we encourage EPA to utilize this full range of settlement options, including cash out settlements under § 122(h) (1).

¹ Letter from Nicoletta Di Forte re: Diamond Alkali Superfund Site, Lower 8.3 Miles of Lower Passaic River, Commencement of Negotiations for Remedial Design (March 31, 2016).

While Coats & Clark has petitioned EPA for de minimis status under § 122(g), Section 122(h)² (1) provides EPA with the broadest discretion to craft an equitable cash out settlement that reflects the unique nature of the LPR. Unlike EPA's prototypical de minimis settlement site, there is no "waste in" list for the many hundreds of parties that have discharged, directly or indirectly, to the LPR, and even if such a list could be developed it would be of no value without accounting for the substantial share of such discharges that never settled in the LPR sediment, that over time were transported out of the LPR, or that were removed by prior navigational dredging. Because § 122(h) does not impose any type of volumetric or mass-based cutoff, it affords EPA a greater ability to cash out the "'peripheral players' in the Superfund process," those "who for equitable, financial, or other reasons are not the primary focus of Superfund enforcement activities at the site."³

In a site involving hundreds of PRPs (even excluding parties who are no longer in existence or who will never be identified due to the passage of time), most of whom have no connection to the substances that are driving the risk and remediation of the FFS Study Area, a cash out settlement would advance Section 122(h)'s goals of "reduc[ing such parties'] transaction costs, provid[ing] them with a high degree of repose, and creat[ing] greater fairness in the Superfund program."⁴ Therefore, while Coats & Clark and nine other PRPs have petitioned EPA for de minimis treatment, and we are prepared to pursue that petition upon EPA's response⁵, we also recognize a cash out settlement can be readily tailored to site-specific factors and considerations under Section 122(h)(1).

2. PRPs should be divided based upon contaminant type, prioritizing for inclusion in cash out negotiations those parties that did not discharge the main risk drivers

At sites like the LPR involving multiple contaminants of concern with widely varying risk profiles, contaminant toxicity is often the largest factor driving the selection of the remedy and allocation of response costs. Accordingly, we suggest that any cash out settlement discussions should begin by dividing PRPs based upon the types of contaminants that they contributed to the LPR sediment. EPA's ROD makes clear that, while multiple substances have been identified as contaminants of concern ("COCs"), dioxins and PCBs are the "main risk drivers."⁶ Those contaminants alone are responsible for 97-98% of the human health risk and the majority of the ecological risk in the LPR, driving the selection of the FFS Remedy.⁷ In contrast, secondary COCs such as copper and lead were not included to any significant degree in EPA's remedial decision-making process.⁸

² 42 U.S.C. § 9622(h)(1).

³ EPA, *Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority* at 8 (Dec. 22, 1988).

⁴ *Id.*

⁵ This letter does not replace or in any way effect the outstanding petition dated March 10, 2015, submitted on behalf of Coats & Clark and nine other PRPs that did not discharge the contaminants that are driving the FFS Remedy, which sets forth their eligibility for a de minimis settlement.

⁶ EPA, ROD, Attachment E: Updated Mechanistic Model at 11-23 (2016).

⁷ EPA, ROD at 29 and Tables 21-23b.

⁸ EPA, ROD, Appendix V: Response to Comments at 212-213..

EPA's remedy is not only being driven by a limited number of contaminants, but also by a relatively small mass of those contaminants. While there is an estimated 9.7 million cubic yards of sediment in the LPR, far more risk is attributable to an estimated 24 kg of dioxin than to 23,000 kg of PCBs and 41,000 kg of mercury combined.⁹ EPA's preliminary remediation goals vary by orders of magnitude depending upon the toxicity of the contaminant, with contaminant mass playing a relatively insignificant role in remedy selection or implementation. An initial division of PRPs based upon volume or mass would inequitably shift response costs to the parties who are not responsible for the primary risk drivers.¹⁰

3. Any consideration of contaminant mass should be measured in terms of contributions to the existing LPR sediment

We also suggest that once EPA has divided parties based upon contaminant type, it has the discretion to consider all other relevant factors in determining a PRP's respective settlement eligibility. Contaminant volume or mass is frequently considered in CERCLA allocations and settlement negotiations. However, as reflected in EPA's selection of a multi-billion dollar remedy for a single Operable Unit, the LPR is not a typical Superfund site, and therefore any consideration of volume or mass must be tailored to the unique circumstances presented by an estuarine environment which was regularly dredged for navigational purposes.

In particular, any consideration of contaminant mass should be measured in terms of PRP contributions to current LPR sediment contamination, not historic discharges to the water column. The ROD was "issued under CERCLA to address contaminated sediment in the lower 8.3 miles."¹¹ Past discharges that are not present in that sediment have no bearing upon the selection or cost of the FFS Remedy. The selected remedy is the lodestar for both allocation and settlement discussions under CERCLA, with each PRP's share determined based upon its "relative responsibility for (1) the need for remediation at the Site, (2) the selection of the particular remedy, and (3) the cost of the selected remedy."¹² Accordingly, mass-based calculations are relevant only if they take into account contaminant fate and transport, which resulted in the natural removal or burial of large amounts of hazardous substances, as well as the effects of navigational dredging, which removed approximately 15 million cubic yards of sediment from the FFS Study Area between 1875 and 1950. Following 1950, navigational dredging was less frequent and mostly limited to the lower 1.9 miles of the FFS Study Area.¹³

EPA itself has described the cessation of regular navigational dredging in 1950 as a turning point in the history of the LPR, which, along with the growth of heavy industrial activities in the mid-20th century, "created ideal conditions for the accumulation of contaminated sediments in the

⁹ EPA, ROD at 2; ROD Appendix V at 38-39 ("Due to the toxicity of dioxin, relatively small quantities can have a big effect on human health and the health of organisms living in the River.")

¹⁰ *United States v. Monsanto Co.*, 858 F. 2d 160, 172 (4th Cir. 1988) ("Common sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others ... could result in disastrous consequences.")

¹¹ EPA, ROD at 20.

¹² *U.S. v. Atlas Minerals & Chems.*, 1995 U.S. Dist. Lexis 13097 at *271 (E.D. Penn. August 23, 1995)

¹³ See EPA, ROD at 17.

Lower Passaic River” in the ensuing decades.¹⁴ Dioxins and PCBs were scarcely present in the LPR prior to 1950, and, like most other COCs, they did not reach peak levels until a decade or more thereafter.¹⁵

Unlike a landfill, in this case there is no readily-accessible record of the mass of hazardous substances that hundreds of parties discharged over more than a century. However, we believe that PRPs’ relative contributions to existing sediment contamination can be established by alternate methods. Initially, parties, like Coats & Clark’s predecessor the Clark Thread Company, that operated predominantly or entirely before 1950 had little to no contribution to the critical post-1950 period of sediment infilling, and are far removed from the current sediment contamination driving the FFS remedy. The same is true for geographically remote parties, and for parties with spills or discharges that were incidental, non-recurring, or otherwise of marginal consequence. Through the application of these criteria, it could be readily concluded that certain parties should be invited to participate in cash out discussions because, at most, they are potentially responsible for a minimal amount of non-dioxin and non-PCB contaminants in the present-day river.

4. Past cooperation should be considered in determinations of settlement eligibility

As EPA is aware, dozens of parties, including Coats & Clark, have already incurred considerably more than \$100 million dollars investigating and remediating the LPR. Unfortunately, many other PRPs, including several who received general notice letters from EPA, have not contributed to those efforts. Voluntary cooperation with the government is a broadly-recognized criterion in Superfund allocations, and the principal objective of CERCLA’s settlement procedures.¹⁶ In recognition of those policy considerations, and to incentivize voluntary participation in future Superfund matters, we believe that past cooperation should be considered in determining cash out eligibility for the LPR, and agree that recalcitrant parties that have not participated in the funding of the RI/FS and other LPR removal actions should not be eligible for a cash out settlement.

5. Conclusion

We realize that a detailed description of Clark Thread’s historic operations is premature. However, we are available to make a detailed presentation, based on an extensive historical investigation and scientific analysis, in support of our request for a seat at the table during upcoming cash out discussions. We want to emphasize that at this juncture we are merely requesting the opportunity to participate in such negotiations, not a definitive determination regarding our ultimate eligibility for a settlement in any particular amount. We are committed to playing an active and constructive role in the ensuing cash out discussions, and are prepared to negotiate an appropriate contribution consistent with the LPR’s unique history and our client’s extremely attenuated connection to the contamination at issue in the ROD.

¹⁴ *Id.*

¹⁵ EPA, Focused Feasibility Study, Appendix A (Data Evaluation Report 3: Contaminant History as Recorded in the Sediments) at 3-7, 3-11, 3-19 and Fig. 3-5, 3-7a (2014).

¹⁶ EPA, Interim CERCLA Settlement Policy at 2, 4 (Dec. 5, 1984) (“The Agency recognizes ... that voluntary cleanups are essential to a successful program for the cleanup of the nation’s hazardous waste sites ... The Agency will create a climate that is receptive to private party cleanup proposals.”)

August 26, 2016
Page 5 of 5

We appreciate your consideration and look forward to hearing from you.

Respectfully,

A handwritten signature in blue ink, appearing to read "Dan Riesel", written in a cursive style.

Daniel Riesel